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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

JANE ANDERSON, Appellant, vs. IDAHO TRANSPORTATION DEPARTMENT Respondent.	)	IPC NO. 97-10 DECISION AND ORDER ON PETITION FOR REVIEW

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on July 8, 2002. Petitioner Jane Anderson (Anderson) was represented by Iver Longeteig, Respondent Idaho Transportation Department (ITD) was represented by David Lloyd. The petition for review involves the hearing officer's decision dated November 29, 2001.

WE AFFIRM.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

Anderson was employed by ITD as a Senior Research Analyst from July 25, 1994, until her final dismissal on May 2, 1997. In January 1996, Anderson requested a two week medical leave of absence under the 1993 FMLA, which was approved.

Anderson had additional absences during 1996, and provided no documentation in support of further requests for FMLA leave until October 1996. On October 16, 1996, Anderson submitted a Certification of Physician or Practitioner ("October Certification") to support her request for medical leave under the FMLA. This document was submitted by Anderson's physician, Dr. Leslie J. Stubbs ("Dr. Stubbs"), and listed her diagnosis as Parimenopausal Syndrome and depression. Specifically, in response to question 9 on the Certification, Dr. Stubbs indicated Anderson was able to perform the functions of her position. Also, in response to the portion of question 6 on the Certification which asked whether it was medically necessary for Anderson to be off work intermittently, or work less than her normal scheduled hours, Dr. Stubbs indicated: "Patient requires follow-up physician visits approx. every other month, occasionally more frequently for adjustments to (illegible) and antidepressant medications."

Based on the responses in the October Certification, ITD was given notice Anderson was able to perform the functions of her position, but may need time off for doctor's visits once every couple of months or so, occasionally more frequently if necessary for routine adjustments to her medications. In reliance upon Dr. Stubbs' October Certification, Anderson was notified on October 18, 1996, by her supervisor, Dave Amick ("Amick"), that her normal job responsibilities included reporting to work on time and further instances of absence without leave would endanger her position with ITD.

On November 13, 1996, Anderson submitted a second two-page Certification ("November Certification") in support of her request for intermittent medical leave under the FMLA. The November Certification was again submitted by Dr. Stubbs. It listed her

diagnosis as migraine headaches, Parimenopausal Syndrome, and depression. Dr. Stubbs indicated in the November Certification in question 9 that Anderson had intermittent difficulties with poor concentration, oversleeping, and migraines. However, Dr. Stubbs indicated Anderson was able to perform the functions of her position. Specifically, in response to a portion of question 6 asking whether it was medically necessary for Anderson to be off work intermittently or work less than her normal scheduled hours, Dr. Stubbs did not indicate Anderson required intermittent leave or a reduced schedule, but rather indicated "Patient requires fairly frequent follow-up visits i.e. every 1-2 months. Medication regimen involves antidepressant medication and estrogen."

Anderson maintains the October and November Certifications provided her by ITD for Dr. Stubbs to fill out were the incorrect forms and she should have been given the correct form, a WH-380 version of the Certification dated March, 1995. She contends this correct form, unlike the October and November Certifications she was given, provides and calls for Dr. Stubbs' opinion on the necessity of her taking off work "intermittently" and would have qualified her for FMLA leave. She contends the October and November Certifications she was given, dated December 1994, did not address the alternative of intermittent leave.

It is undisputed that between December 31, 1996, and February 13, 1997, Anderson was out sick from work approximately 161 hours out of a possible 260 work hours for various illnesses. In fact, when Amick returned from vacation on January 13, 1997, Anderson had been absent from work for approximately 47 of the total 72 hours during his absence. *Amick Affidavit, p. 2, ¶ 6.* Based on the November Certification

(most recent), and pursuant to ITD policy, Amick advised Anderson she would need to provide a doctor's statement in order to justify her latest absences.

On January 16, 1997, ITD received a one line note from Dr. Stubbs requesting Anderson's absences in December 1996 and January 1997 be excused for "medical illnesses." Again, between January 16, 1997, and January 21, 1997, Anderson was absent without leave for three consecutive days. On January 23, 1997, Anderson was found sleeping in the women's restroom when she was supposed to be on duty. *Amick Affidavit, p. 3, ¶ 9.* Amick had someone drive Anderson home. Anderson called in sick the next day. Based on these absences, Amick informed Anderson she was not to return to work without a more detailed doctor's statement supporting her request for leave in December and January, and verifying her ability to perform the functions of her position. *Id.*

In addition, ITD wrote to Dr. Stubbs in an effort to obtain information that would enable them to make a determination of whether Anderson's latest absences meant she had a serious health condition which would qualify her for leave under the FMLA. ITD specifically requested information regarding whether Anderson was medically unable to come to work, for what reason, and whether or not Anderson's illness related directly to one or more of the health conditions that might qualify her for leave under the FMLA.

Anderson maintains ITD sought her entire medical records in violation of federal regulations supporting FMLA in their efforts to investigate her medical condition. Anderson also indicates she told her supervisors she had not given Dr. Stubbs a medical release to provide ITD with further medical information than that contained in the October and November Certifications. Anderson also submits that by writing Dr.

Stubbs to obtain additional information, ITD violated 29 C.F.R. § 825.307(a) which mandates "if an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider."

When Anderson returned to work on January 30, 1997, she provided ITD with another one line notice from Dr. Stubbs which stated unconditionally that Anderson was fit to return to work. Based on this note, Amick notified Anderson in writing on January 31, 1997, that she was instructed to continue working her normal work schedule. Anderson came to work as required on Friday, January 31, 1997, and Monday, February 3, 1997. However, Anderson was then absent without leave for eight consecutive work days from February 4, 1997, until February 13, 1997. This is undisputed. On February 13, 1997, ITD issued Anderson a Notice of Contemplated Action which provided Anderson with notice that ITD was considering dismissing her from her classified position for repeated failure to report to work from December 31, 1996, through February 13, 1997.

Anderson did not respond to this Notice of Contemplated Action, and remained absent from work without leave through February 20, 1997, when ITD sent her a Notice of Dismissal. Anderson was then placed on administrative leave with pay from February 24, 1997, until May 2, 1997, while she grieved her dismissal pursuant to then existing Idaho Code 67-5315 and IDAPA 28.01.01.200. On April 30, 1997 an Impartial Review Panel (convened pursuant to then existing Idaho Code 67-5315(4)(b) and then existing IDAPA 28.01.01.200.03) submitted its Findings and Conclusions upholding

ITD's decision to take disciplinary action. Anderson was given her final Notice of Dismissal on May 2, 1997.

B. Appeal to Personnel Commission.

Anderson filed a timely notice of appeal of employment dismissal to the Commission on May 22, 1997. She claimed the basis for her appeal was threefold:

1. The dismissal was without cause within the meaning of Idaho Code § 67-5309(n) and IDAPA 28.01.01.190 (currently IDAPA 15.04.01.190);

2. The dismissal constituted illegal discrimination because of her medical condition; and

3. The dismissal violated the FMLA, 29 U.S.C. §§ 2601, *et seq.*

ITD filed a Motion for Summary Judgment, along with an accompanying Memorandum, on December 17, 1999. Anderson filed her Memorandum Opposing Summary Judgment on January 14, 2000, and ITD filed its reply on January 27, 2000. On February 14, 2000, a hearing was held on the Motion for Summary Judgment, and both sides were given the opportunity to present oral argument.

On November 29, 2001, the Hearing Officer issued his Order Granting Motion for Summary Judgment.

II.

ISSUES

1. Whether the Hearing Officer erred in granting ITD's Motion for Summary Judgment based upon the record before him?

2. Was the 21-month delay between the hearing on the Motion for Summary Judgment and the Hearing Officer's issuing of the decision a violation of Anderson's right to due process of law?

III.

STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

> When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06 [currently 15.04.01.201.06]. That is, the burden of proof is one the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01 [currently 15.04.01.190.01], exist by a preponderance of the evidence.
>
> On a petition for review to the Idaho Personnel Commission, the Commission reviews the record and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Department of Welfare, IPC No. 94-03 (February 21, 1996), *aff'd.*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

> Summary judgment can be rendered if the pleadings on file, together with any affidavits, show that there is no genuine issue as to any material fact. Under such circumstances, a party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

Kaufold v. Idaho Personnel Commission, IPC NO. 96-06, November 6, 1996.

IV.

DISCUSSION

1. October and November Certifications

The crux of Anderson's appeal alleges ITD gave Anderson the wrong form for obtaining FMLA certification when it gave her the October and November Certifications. Anderson alleges she was prejudiced by this procedural breach because the forms she was provided did not allow her doctor to fully describe whether she required FMLA leave on an intermittent basis or to work on a reduced leave schedule basis as required by 29 C.F.R. § 825.306(b)(2)(ii). Essentially, Anderson alleges had she been given the correct certification form (WH-380, dated March 1995), her physician would have been able to fully describe her condition and advise ITD she required intermittent leave, thus qualifying her for FMLA leave and precluding any proper cause for her termination.

To be eligible for FMLA leave, an employee must establish two elements: (1) have a "serious health condition" as that term is defined by the FMLA, and (2) that condition must prevent an employee from performing the duties of her job. Stoops v. One Call Communications, Inc., 141 F.3d 309 (7th Cir. 1998). As mentioned, Anderson asserts had ITD followed the correct procedure under 29 C.F.R. § 825.306(b), with respect to the "correct" form provided her physician, she would have be able to fully document her condition and qualify for intermittent FMLA leave. She asserts the October and November Certifications provided did not allow entries for intermittent leave and therefore did not follow the procedure as set forth at 29 C.F.R. §825.306.(b)(2)(ii).

In support of this claim, Anderson alleges ITD was required under 29 C.F.R. § 825.306(b) to use form WH-380 or another form containing the same basic information. The relevant sections of 29 C.F.R. § 825.306 provide:

> (a) DOL has developed **an optional form** (Form WH-380 as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to these regulations.) This **optional form** reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge. 29 C.F.R. § 825.306(a) (emphasis added).
>
> (b) **Form WH380, as revised, or another form containing the same basic information, may be used by the employer;** however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for . . . . 29 C.F.R. § 825.306(b) (emphasis added).

From the plain language of this regulation, the use of form WH-380 is optional and discretionary as long as the employer does not request impermissible information. Anderson has cited no case law or statutory authority in support of her argument that ITD was required to use form WH-380. The law simply provides an employee seeking FMLA leave has the obligation to provide the employer with sufficient information to establish an FMLA-qualifying reason for the needed leave. 29 C.F.R. § 825.208(a)(2). The use of form WH-380, or any other FMLA request form promulgated by the Department of Labor, is entirely at the discretion of the employer.

Crucial to Anderson's appeal is her assertion the Certifications provided her in October and November of 1996 did not comply with 29 C.F.R. § 825.306(b)(2)(ii) by providing for an entry as to "whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e. part-time) as the result of the serious health condition . . . , and if so, the probable duration of such schedule."

She maintains the Certifications provided her did not have such an entry available as form WH-380 did.

A review of the November Certification form (October form is identical) provided Anderson for her physician to fill out renders Anderson's allegation without merit. Question 6 of the November Certification asks Dr. Stubbs to address the following with respect to her treatment of Anderson:

> "Regiment of treatment to be prescribed (indicate number of visits, general nature and duration of treatment, including referral to other provider of health services, include schedule of visits for treatment if it is medically necessary for the employee to be off work on an **intermittent basis or to work less than the employee's normal schedule of hours per day or days per week**)." (Emphasis added.)

This section of the Certification provided Anderson clearly provides for Dr. Stubbs to describe whether Anderson requires intermittent FMLA leave or is required to work part-time as a result of her particular illness. Therefore, contrary to Anderson's assertions, the October and November Certifications given Anderson **did** provide for an entry with respect to whether she required intermittent leave, and thus procedurally complied with 29 C.F.R. § 825.306(b)(2)(ii).

Based upon a review of the October and November Certifications provided Anderson, it is clear said Certifications complied with FMLA procedural regulations, and ITD was entitled to rely upon the Certifications submitted by Anderson's physician in determining whether she was eligible for FMLA leave.

As stated earlier in this Memorandum, Dr. Stubbs, in filling out both Certifications, indicated Anderson was able to perform the functions of her position in response to question 9. In response to question 6 on the October Certification, again asking whether it was medically necessary for Anderson to be off work intermittently, she

indicated: “Patient requires follow-up physician visits approx. every other month, occasionally more frequently for adjustments . . . ,” and in response to question 6 on the November Certification she responded: “Patient requires fairly frequent follow-up visits i.e. every one to two months, medication regiment involves antidepressant medication and estrogen.” On both Certifications Dr. Stubbs indicated Anderson **was able to perform the functions of her position.**

The Hearing Officer correctly found ITD was entitled to rely upon the October and November Certifications provided by Anderson and her physician indicating she was able to perform the functions of her job. It is undisputed in the factual record that Anderson was absent from her job for extended periods of time (between December 31, 1996, and February 13, 1997, Anderson was out sick from work approximately 161 hours out of a possible 260 work hours). *Amick Affidavit, p. 2, ¶ 6.* Further, two one-line notes received from Dr Stubbs on January 16, 1997, and January 30, 1997, indicated unconditionally that Anderson was fit to work. Given the fact that Anderson’s physician, Dr. Stubbs, indicated on the Certifications she was able to perform the functions of her job, and the Certifications met the requirements of the FMLA procedural regulations, Anderson’s frequent absenteeism was without excuse. Therefore, as the Hearing Officer correctly found as a matter of law, ITD demonstrated proper cause for her termination pursuant to Idaho Code § 67-5309(n)(11) and Idaho Personnel Commission Rule 190.01.k. (habitual pattern of failure to report for duty at the assigned time and place).

2. Medical Records Request

As indicated earlier, in addition to the "wrong form" argument, Anderson alleges ITD procedurally violated the FMLA (29 C.F.R. § 825.306(b)) by demanding "complete medical records" which were not needed. A thorough review of the record does not support this allegation. In fact, the only evidence put forth by Anderson in support of this allegation is her conclusory statement to that effect and pure speculation to that effect in an affidavit she submitted to the record. *Affidavit of Jane R. Anderson Opposing Motion for Summary Judgment*, ¶ 17. As ITD notes, conspicuously absent is any affidavit from Dr. Stubbs addressing this allegation. There is no evidence in the record to support this claim.

3. ITD Request for Further Information from Dr. Stubbs

Finally, Anderson has alleged ITD's request for further information from Dr. Stubbs on January 23, 1997 procedurally violated the FMLA (29 C.F.R. § 825.307(a)) by requesting additional information from her health care provider after her submission of completed Certifications (October and November 1996). Anderson argues if ITD questioned the veracity of the Certifications it was procedurally required to get an independent opinion, not request additional information from Dr. Stubbs.

This argument is flawed. ITD has never questioned the Certifications. ITD's request for further information or, more precisely clarification, in January 1997 was in response to a one-line note from Dr. Stubbs dated January 16, 1997 excusing Anderson from work for December and January absences for "medical illnesses". ITD was not requesting additional information than what was called for in the October and November Certifications and, thus, there was no procedural violation pursuant to 29 C.F.R.

§ 825.307(a). The one-line note from Dr. Stubbs was not sufficient for ITD to approve FMLA leave for Anderson.

ITD was relying on the October and November certifications which stated she was able to work and perform the functions of her job. The request did not negate ITD's reliance on the November Certification but, rather, reinforced such reliance. Absent more specific information as to Anderson's "medical illnesses" during December and January, ITD, relying on the Certifications, would have to deny her FMLA leave. ITD was requesting elaboration from Dr. Stubbs, beyond a one-line note, to be better able to assess whether Anderson's situation had changed from the November Certification information, and whether ITD could allow FMLA leave for the period of absence. Without additional information, ITD had to rely on the November Certification.

B. Due Process.

In addition to her specific FMLA claims, Anderson claims generally she has suffered lasting and material harm by being blackballed from state employment due to the Hearing Officer's failure to render a timely decision. Anderson cites the case of Ely v. Bowman, 925 P.2d 567 (Okla. App. 1996). In that case, the trial court took approximately 21 months to render a decision after a bench trial. However, the Ely case is easily distinguished from the instant case before the IPC because it is based on an Oklahoma District Court rule which is inapplicable before proceedings before the IPC. As the appellate court in Ely stated:

> District court rule 27 does impose a duty on the court to comply with the time limitations when taking a case under advisement. If the trial court violates this duty there may be an irregularity in the proceedings. Nonetheless, all motions for a new trial must meet the threshold test that the stated ground, such as irregularity in the proceedings, affects "materially the substantial rights of such party."

Id. at 571.

While the fact that the Hearing Officer in this case delayed over 21 months before rendering a decision is certainly irregular, even if we assume the Ely case is applicable in that this delay did constitute an "irregularity in the proceedings," Anderson has clearly failed to establish that this irregularity has materially affected her substantial rights. In fact, Anderson conclusively claims she has demonstrated on "several points" that the Hearing Officer "forgot" her arguments. However, Anderson has pointed to no substantial competent evidence in support of this assertion besides a blanket conclusory statement to that effect.

In fact, Anderson simply assumes the Hearing Officer "forgot" her argument with respect to the "wrong form" being provided to her by ITD. As discussed earlier in this Memorandum, a full review of the record reveals the Hearing Officer's conclusion that Anderson's FMLA procedural rights were followed was correct. As also stated earlier, the Certifications provided Anderson met the requirements under the FMLA. There is no issue of material fact that Anderson was absent from work between December 1996 and February 1997 without leave. There is also no issue of material fact that she indeed, based on this unexcused absence, had a habitual pattern of failure to report to work in violation of Idaho Personnel rule 190.01.k. This constitutes proper cause for a dismissal as a matter of law. Absent any substantial competent evidence to the effect the Hearing Officer "forgot" Anderson's arguments, and absent any substantial competent evidence that the Hearing Officer's decision was erroneous, Anderson has suffered no prejudice by the admittedly substantial delay in the Hearing Officer's rendering of a decision in this matter.

V.

CONCLUSION

Based on the foregoing, the Commission finds Anderson was properly disciplined for her repeated absences between December 1996 and February 1997. A habitual pattern of failure to report for duty is undisputed because Anderson was not entitled to FMLA leave as determined by ITD after following FMLA procedure. Violations of Rule 190.01k and Idaho Code § 67-5309(n)(11) were established by the record, and there was no need for a hearing in this matter. The Commission affirms the Hearing Officer's granting of summary judgment in favor of ITD.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

(1) That the findings of fact are not based on any substantial, competent evidence;

(2) That the commission has acted without jurisdiction or in excess of its powers;

(3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this ____ day of August, 2002.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

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Mike Brassey, Commission Chair

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Ken Wieneke, Commissioner

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Don Miller, Commissioner

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Pete Black, Commissioner

_____
Clarisse Maxwell, Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the DECISION AND ORDER ON PETITION FOR REVIEW in *Anderson v. Idaho Transportation Department*, IPC No. 97-10, was delivered to the following parties by the method stated below on the ___ day of September, 2002.

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